No. 217

IN THE

Supreme Court of the United States

October Term, 1950

ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD, JAMES E. DOGGETT AND RALPH BAKER,
Petitioners,

v.

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS AND MRS. MABLE L. PRICE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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The Congress of Industrial Organizations submits this brief as *amicus curiae*. The written consent of all parties to the case to the filing of this brief has been filed with the Clerk.

Interest of the Congress of Industrial Organizations

The filing of this brief does not in any way mean that the CIO agrees with the political views apparently held by the petitioners. On the contrary, the CIO endorses the Marshall Plan, and its representatives have repeatedly appeared before congressional committees in support of the Plan. Nevertheless we consider it to be vitally important to the preservation of democracy that all persons be protected in their right to

advocate any lawful course of action, without interference by self-appointed vigilantes.

Moreover, organizers for the CIO and its affiliated unions often must operate in communities dominated by entrenched and powerful groups hostile to unions. In these communities employer stimulated mobs are frequently used to prevent union organizers and members from exercising their constitutional rights of free speech and assembly. The CIO, therefore, has a direct concern that the protection of Constitutional and other federally created rights shall not be cut down by a narrow construction or an adjudication of unconstitutionality of the Civil Rights Act.

In general, we agree with the position which is taken in this Court by the respondents. In the interest of conserving the Court's time we will not repeat those arguments, but will endeavor to state concisely certain somewhat different considerations which we believe should lead to affirmance of the judgment of the Court of Appeals.

I.

The Complaint States a Cause of Action Under Section 47(3) of Title 8 of the United States Code

We submit that the allegations of the complaint, which are summarized in the respondents brief, clearly state a cause of action within the literal language of the statute.

Section 47(3) is divided into two parts. The first part of the section, down to the final semicolon, describes certain types of conspiracies "by two or more persons" to deprive other persons of certain enumerated and described rights. However, such a conspiracy is made actionable under the latter half of the section only if an act is done in furtherance of the conspiracy "whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States * * *." Thus the first part of the statute describes certain conduct, and the second part makes it actionable if it has certain results.

Both of the statutory requirements are met by the complaint in the present case.

A. The Complaint Alleges Conduct of the Sort Described by the First Part of Section 47(3).

1. The conduct made actionable by the first part of the section (if the results specified in the second portion ensue) includes "If two or more persons * * * conspire * * * for the purpose of depriving * * * any person or class of persons of * * * equal privileges and immunities under the laws * * *."

According to the allegations of the complaint the petitioners conspired to prevent respondents from peaceably assembling for the discussion of national public issues, adopting resolutions with regard thereto, and forwarding them to the President and members of Congress [R. 4-5]. The complaint further alleges that petitioners had not interfered with numerous other public meetings held by persons and organizations adhering to views with which petitioners agreed [R. 6].

That the rights to assemble peaceably, discuss public affairs, and petition the government for a redress of grievances, are "privileges and immunities under the laws" is hardly to be denied. (It will be shown in Point II that they are rights derived from the federal Constitution, and so constitutionally within the protective power of federal legislation.) The statutory requirement that the defendants must conspire to deprive the plaintiffs of "equal" privileges is met by the allegation that other groups holding views more acceptable to the defendants met with no interference from them.

2. The first part of Section 47(3) likewise covers a conspiracy

> "to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; * * *"

It likewise covers a conspiracy "to injure any citizen in person or property on account of such support or advocacy."

Here the complaint alleges that among the principal purposes of the respondents' club was participation in the election of the officials of the United States, including the President,

Vice President and members of Congress [R. 2-3]. And the complaint alleges that the particular meeting which was broken up by the petitioners was held for the purpose of discussing the Marshall Plan and adopting resolutions opposing it which would be forwarded to the President and to members of Congress [R. 4-5].

The nexus between requesting the President and members of Congress to reject the Marshall Plan and "support or advocacy * * * toward or in favor of the election of" a President and members of Congress, is surely sufficiently close to bring the former within the statutory protection explicitly accorded the latter. While it does not appear that an election of federal officials was immediately impending at the time of the meeting or was to be a direct subject of consideration, obviously a request to the incumbent President and the members of Congress to reject the Marshall Plan was directly related to ultimate support or advocacy of the election of particular persons to the Presidency or to Congress.

To interpret the statute as protecting only the right to support or advocate the election of particular candidates, and not as protecting the right of support or advocacy with respect to the controlling underlying issues of principle, would encourage creation of an illiterate and ill-informed electorate. The statutory language "support or advocacy * * * toward or in favor of" indicates a broader purpose to protect legitimate political activity related to the ultimate election of the President, Vice President, or members of Congress. As stated in the opinion of the court below,

> "A representative government cannot function properly unless its officers are informed of the opinions and desires of the people whom they represent."

B. The Complaint Alleges Results of the Sort Described in the Second Half of Section 47(3).

The second portion of Section 47(3)—that is the portion following the final semicolon—provides that a conspiracy within the first part of the section shall be actionable if anyone engages in an act in furtherance thereof "whereby another is injured in his person or property, or deprived of hav-

ing and exercising any right or privilege of a citizen of the United States."

The complaint obviously meets the requirements of this portion of the Subsection. As has already been shown, it alleges the deprivation of rights and privileges of a citizen of the United States. Moreover the complaint specifically alleges injuries to the persons of the respondents by threats of assaults and actual assaults [R. 7-8].

II.

The Statute, Construed to Create the Cause of Action Alleged in the Complaint, Is Constitutional

Section 47(3), construed to create a cause of action against private individuals for the conduct alleged in the complaint, is constitutional. It is within the power conferred by the Constitution upon Congress over each of three different subjects.

A. The Statute Is Within the Power of Congress Over the Election of Federal Officials.

It has been settled ever since *Ex Parte Yarbrough*, 110 U. S. 651, that the Federal Government has power to protect the right to vote at congressional elections against interference even by private individuals. That doctrine was reasserted by the Court in 1941 in *United States* v. *Classic*, 313 U. S. 299. In that case the Court pointed out (313 U. S. at 315) that

> since the constitutional command [*i.e.*, Article I, Section 2] is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth amendments, is secured against the action of individuals as well as of states.

Thus there can be no question as to the constitutionality of that portion of the statute creating a cause of action for conspiracy to intimidate any citizen from giving his support or advocacy toward or in favor of the election of federal officials. As has been shown, the complaint stated a cause of action on this theory, and that alone would support affirmance of the judgment of the court below.

B. Section 47(3) Is Within the Power of Congress to Protect the Right to Assemble to Discuss National Affairs and to Petition Congress.

The First Amendment of the Constitution protects "freedom of speech" against infringement by Congress, and likewise "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Similar protections against state action are implied from the due process clause of the Fourteenth Amendment.

Thomas v. *Collins*, 323 U. S. 516.

But quite apart from these constitutional provisions according protection against governmental infringement, the right to assemble to discuss federal affairs and to petition the federal government for redress of grievances was an inherent right of federal citizenship, under the body of the original Constitution. Thus, the Supreme Court declared in *United States* v. *Cruikshank*, 92 U. S. 542, 552:

> "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."

The Court then went on to say that if the purpose of the defendants in that case had been "to prevent a meeting for such a purpose" the case would have been within the criminal statute (Section 241 of Title 18) whose provisions parallel those of Section 47(3) on the civil side.

It is thus perfectly clear that the right to assemble peaceably to discuss national affairs and to petition for a redress of grievances are "privileges and immunities" under the federal Constitution, and are also rights or privileges "of a citizen of the United States." Therefore it was plainly within the power of the federal government to confer a cause of action for in-

fringement of that right or privilege, as it did by Section 47(3). To the same effect as the quotation from the *Cruikshank* case are *In re Quarles and Butler*, 158 U. S. 532, and *Hague* v. *CIO*, 307 U. S. 496.

C. Section 47(3) Is Within the Power of Congress Under Article IV, Section 4 of the Constitution to Guarantee to Each State a Republican Form of Government.

While the republican form of government clause of the Constitution has not been much looked to as a source of congressional power, Section 47(3) is within both the language and purpose of that clause. The constitutional provision in question directs that "The United States shall guarantee to each State in this Union a republican form of government * * *." The obvious purpose of this clause was to direct the United States to safeguard in every state those basic rights which are essential to the existence of a republican form of government.

It was precisely for that purpose that Section 47(3) of Title 8 was enacted. That Subsection was originally enacted as part of Section 2 of the Act of April 20, 1871 (Chapter 22, Section 2, 17 Stat. 13). It was one of several statutes passed in the years following the Civil War for the purpose of giving federal protection to the constitutional and other federally created rights of Negroes in the South. And while the statutes unquestionably were enacted primarily for the protection of Negroes, they were made applicable in general terms to protect federal rights against local infringement by hostile state or individual action.

The doctrine is, of course, a familiar one that Article IV, Section 4 is not a source of federal *judicial* power. In other words, it confers upon the federal judiciary no power to strike down state legislation or other action on the ground that it is undemocratic. In enunciating this doctrine, however, the Supreme Court has usually added the qualification that while Article IV, Section 4, is not a source of judicial power, it is a source of *congressional* power. See *e.g.* statement of the Court in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 612, that "the enforcement of that guarantee, according to the settled doctrine, is for Congress, not the courts." Accord:

State of Ohio ex rel. Bryant v. *Akron Metropolitan Park Dist. for Summit County et al.*, 281 U. S. 74;

Pacific States Teleph. and Teleg. Co. v. *Oregon*, 223 U. S. 118; and

Marshall v. *Dye*, 231 U. S. 250.

And in at least one case, *State of Ohio on Relation of David Davis* v. *Hildebrant*, 241 U. S. 565, Article IV, Section 4, was pointed to by the Court as the source of congressional legislative power. The Court held, moreover, just as it had held with respect to state action claimed to violate Article IV, Section 4, that when Congress legislates for the purpose of guaranteeing to the states a republican form of government, the validity of its action is a political question and not for the judiciary.

In that case the Congress by statute had authorized the states to create congressional districts, and the machinery utilized in Ohio for the creation of congressional districts reserved to the people the right to approve or disapprove by referendum the state redistricting legislation. Both the state referendum and the federal statute were attacked as in violation of Article IV, Section 4. Chief Justice White, speaking for the Court, rejected the contention in the following language:

> "In so far as the proposition may be considered as asserting * * * that any attempt by Congress to recognize the referendum as a part of the legislative authority of a state is obnoxious to a republican form of government as provided by § 4 of article 4, the contention necessarily but reasserts the proposition on that subject previously adversely disposed of. And that this is the inevitable result of the contention is plainly manifest, since at best the proposition comes to the assertion that because Congress, upon whom the Constitution has conferred the exclusive authority to uphold the guaranty of a republican form of government, has done something which it is deemed is repugnant to that guaranty, therefore there was automatically created judicial authority to go beyond the limits of judicial power, and, in doing so, to usurp congressional power, on the ground that Congress had mistakenly dealt with a subject which was within its exclusive control, free from judicial interference."

III.

Section 47(3) Is to Be Distinguished From Federal Statutes Seeking to Protect Constitutional Rights Derived Solely From the Fourteenth Amendment.

During the same period which saw the enactment of the statute now before the Court, Congress adopted certain other civil rights statutes. Some of these measures looked for their constitutional authority to Section 1 of the Fourteenth Amendment as a source of congressional power. In accordance, however, with the literal language of that section, it was interpreted by the Supreme Court as affording protection only against state action, as distinguished from action by private individuals, and hence as supporting federal legislation affording protection against state action but not such legislation when aimed at individual action. Accordingly, the federal civil rights measures which sought their constitutional authority in the Fourteenth Amendment were held unconstitutional as applied against private citizens. These *Civil Rights Cases*, 109 U. S. 3, were relied upon extensively by the District Court in this case.

As has been explained, however, Section 47(3), as it applies to the present case, does not look for its constitutional sanction to the Fourteenth Amendment, but to the body of the original Constitution. Such cases as the *Civil Rights Cases*, have, therefore, not the slightest relevance. Thus, in the *Classic* case the Court pointed out that the right to choose members of Congress "unlike those guaranteed by the Fourteenth and Fifteenth amendments, is secured against action of individuals as well as of states." 313 U. S. at 315. And in *Ex Parte Yarbrough*, the Supreme Court pointed out (110 U. S. at 655-6) that:

> "The reference to cases in this court in which the power of congress under the first section of the fourteenth amendment has been held to relate alone to acts done under state authority can afford petitioners no aid in the present case. For, * * * it is quite a different matter when congress undertakes to protect the citizen in the exercise of rights conferred by the constitution of the United States, essential to the healthy organization of the

government itself. But it is a waste of time to seek for specific sources of the power to pass these laws."

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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December, 1950.